UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WATSON & HENRY, P.A.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil Docket No. 96-270-P-H***
	)	
UNION MUTUAL FIRE	***)***	
INSURANCE COMPANY,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this diversity action between a law firm and the company that provided fire insurance covering the firm's offices, plaintiff Watson & Henry, P.A., alleges that defendant Union Mutual Fire Insurance Company breached the contract of insurance and violated two provisions of the Maine Insurance Code. The defendant moves for summary judgment, contending that no genuine issue of material fact exists concerning its compliance with the late payment provision of the Insurance Code, 24-A M.R.S.A. § 2436. I recommend that the defendant's motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved

favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc*., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr*., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

Viewing the facts of record in the light most favorable to the plaintiff yields the following: On June 10, 1994 — the date of the fire giving rise to the insurance claim at issue in this litigation — the defendant asked insurance adjuster John T. Kidder, III to contact a representative of the plaintiff to begin the adjustment of the plaintiff's fire insurance claim. Affidavit of John T. Kidder, III ("Kidder Aff.") (Docket No. 10) at ¶¶ 1, 3-4. Kidder met on June 13 and 16, 1994, with Bernard Watson, a principal of the plaintiff, at the scene of the fire. *Id*. at ¶ 5; Affidavit of Bernard Watson

("Watson Aff."), appended to plaintiff's Statement of Disputed Material Facts ("Plaintiff's SMF") (Docket No. 13), at ¶ 1. At the June 16 meeting, Kidder provided Watson with inventory forms and instructions on how to complete the forms so as to make a claim against the policy. Kidder Aff. at ¶ 6. Kidder spoke with Watson on July 12, 1994, at which time Watson requested an advance partial payment in the amount of $10,000 in connection with the policy's coverage for business property loss. *Id*. at ¶ 9. At that time, Kidder informed Watson that an accountant, Glenn Ricciardelli, would be contacting him concerning the calculation of the plaintiff's business income loss resulting from the fire. *Id*. at ¶ 10. By letter dated July 25, 1994, Ricciardelli asked Watson for financial documentation concerning this loss. Affidavit of Glenn Ricciardelli ("Ricciardelli Aff.") (Docket No. 11) at ¶ 5 and Exh. A thereto. On July 28, 1994, Kidder sent Watson a $10,000 under the business property loss provision of the policy. Kidder Aff. at ¶ 12.

Kidder received a written inventory from Watson on August 24, 1994, claiming lost assets having a value of $151,779.75. Id. at ¶ 13. On September 12, 1994, Kidder forwarded a draft in the amount of $18,000 to the plaintiff, indicating that the check represented the remaining $17,000 available under the $27,000 policy limit for business personal property loss and the $1,000 that was available for the loss of valuable papers. *Id*. at ¶ 14. Concerning the plaintiff's claim for additional coverage for loss of computer equipment, Kidder asked Watson on September 27, 1994, to provide information indicating which items destroyed by the fire replaced specific items listed on a schedule apparently submitted by the plaintiff to the defendant in 1990. *Id*. at ¶ 15. Kidder wrote to Watson on October 13, 1994, confirming this request and renewing Ricciardelli's request for documentation concerning the claim for business income loss. *Id*. at ¶ 16. On February 13, 1995, Kidder received a letter from Watson that did not include any of the requested information but made a demand for

immediate payment of $21,319 in connection with the plaintiff's loss of computer equipment and software. *Id*. at ¶ 19. A month later — on March 13, 1995 — Kidder received a sworn proof of loss from Watson dated March 11, 1995, and claiming that $238,988.45 was due the plaintiff under the policy — a sum that included the $28,000.00 already paid to the plaintiff by the defendant. *Id*. at ¶ 20. Among the sums included in the March 11, 1995, claim and not included in the sum previously paid were separately itemized sums of $1,498.45 and $,3,500 for debris removal. Sworn Statement in Proof of Loss ("Proof of Loss"), Exh. D to Plaintiff's SMF, at [2]. The defendant neither disputed nor paid this specific aspect of the total claim submitted on that date.[1] Watson Aff. at ¶ 22.

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[1] The plaintiff also contends that the defendant neither disputed nor promptly paid its claim for "extra expense" asserted under the "Electronic Data Processing provision of the policy." Plaintiff's SMF at ¶ 9, citing Watson Aff. at ¶ 22 and Exhs. C and D to Plaintiff's SMF. In his affidavit, Watson makes the following assertion:

> After I filed the formal proof of loss, [the defendant] did not contest nor ask for further information regarding the claim for debris removal under the business owners fire policy; nor did they contest or request further information under the Electronic Data Processing coverage for my claims for extra expense and debris removal.

Watson Aff. at ¶ 22. Exhibit D to the plaintiff's Statement of Material Facts is a copy of the proof of claim submitted by the plaintiff in March 1995; it shows that the plaintiff sought to recover $4,394 in "Extra Expense" as part of a category described as "Electronic Data Processing & Extra Expense," plus an additional $12,500 as part of a category labeled simply as "Extra-expense & cost." Proof of Loss at [2]. Exhibit D to the Plaintiff's SMF is the defendant's written response to Exhibit C, a letter from Kidder to Watson.

It appears that what is at issue here is additional "debris removal" and "extra expense" coverage provided under a separate provision of the policy governing electronic data processing equipment. Although a copy of the insurance policy is appended to the defendant's Statement of Material Facts, neither party has seen fit to refer to any provisions of the contract in their respective factual statements. I therefore do not look to the policy for guidance in deciding the summary judgment motion. *See Pew v. Scopino*, 161 F.R.D. 1 (D. Me. 1995) (parties bound by their Local Rule 56 factual statements and cannot challenge decision based on facts not presented therein). In any event, regardless of which aspect of the insurance policy the plaintiff was invoking when it made claims for extra expenses, it is apparent the defendant responded by seeking additional information. In his written response to the plaintiff's formal claim, Kidder stated, under a heading labeled

(continued...)

Kidder responded in writing on March 31, 1995, requesting specific additional information to support certain aspects of the claim, including the information originally requested by Ricciardelli in July 1994. Kidder Aff. at ¶¶ 21-22; Kidder Letter. At the same time, Kidder forwarded a check for $3,275.00 in connection with the plaintiff's claim for losses of electronic data processing equipment. Kidder Aff. at ¶ 21.

Kidder received a letter from Watson on May 12, 1995, providing the requested documentation concerning replacement of computer equipment. *Id*. at ¶ 23. This letter also demanded payment of the remainder of the plaintiff's claim in connection with electronic data processing equipment, and notified Kidder that Watson had retained independent insurance adjuster Bruce Swerling in connection with the plaintiff's claim for business income loss. *Id*. Kidder sent Watson an additional check for $2,300 on June 13, 1995, to cover additional amounts no longer in dispute on the electronic data processing and software claim. *Id*. at ¶ 24. Kidder received a letter from Swerling on December 8, 1995, providing details of the plaintiff's claim for business interruption losses. *Id*. at ¶ 25. Watson and the accountants retained by the defendant exchanged correspondence concerning documentation of this loss several times between January and March of 1996. Ricciardelli Aff. at ¶¶ 7-9. Kidder wrote to Swerling on April 26, 1996, and offered to pay $22,290.00 to the plaintiff on its claim for business interruption loss. Kidder Aff. at ¶ 29. Kidder forwarded a check in this amount to the plaintiff on May 22, 1996. *Id*. at ¶ 31.

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[1](...continued)
"EXTRA EXPENSES:" "To the extent your firm incurs certain additional expenses related to the continuation of operations, we request that you please itemize them and provide us access of [sic] the corresponding purchase invoices." Letter of John T. Kidder, III to Lyle Watson, Esq. dated March 31, 1995 ("Kidder Letter"), Exh. C to Plaintiff's SMF, at 2.

III. Discussion

Although the defendant's motion purports to seek summary judgment on all three of the plaintiff's asserted claims, its memorandum of law addresses only Count II of the complaint and its reply memorandum implicitly waives any arguments as to summary judgment on Counts I and III. *See* Reply Memorandum of Defendant Union Mutual Fire Insurance Company, etc. ("Defendant's Reply Memorandum") (Docket No. 15) at 1 (describing pending motion as one for "Partial Summary Judgment with respect to Count II"). I therefore address only the defendant's contention that it is entitled to summary judgment on Count II. *See CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 888 F. Supp. 192, 200 (D. Me. 1995) (treating asserted summary judgment ground as waived for lack of facts and arguments), *aff'd*, 97 F.3d 1504 (1st Cir. 1996); *see also Cohen v. Brown Univ.*, 101 F.3d 155, 185 n. 24 (1st Cir. 1996) (issues devoid of "some developed argumentation are deemed to have been abandoned") (citation omitted), *cert. denied*, 65 U.S.L.W. 3599 (U.S. Apr. 21, 1997).

Count II seeks relief under 24-A M.R.S.A. § 2436, which subjects an insurer to liability for interest and attorney fees when it fails to make payment on a claim within 30 days after it receives proof of the loss.[2] Relying on the Law Court's decision in *Marquis v. Farm Family Mut. Ins. Co.*,

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[2] Section 2436 provides that:

> 1. A claim for payment of benefits under a policy of insurance against loss delivered or issued for delivery within this State is payable within 30 days after proof of loss is received by the insurer and ascertainment of the loss is made either by written agreement between the insurer and the insured or by filing with the insured of an award by arbitrators as provided for in the policy, and a claim which is neither disputed nor paid within 30 days is overdue, provided that if during the 30 days the insurer, in writing, notifies the insured that reasonable additional information is required, the undisputed claim shall not be overdue until 30 days following receipt

(continued...)

628 A.2d 644 (Me. 1993), the defendant contends it is entitled to summary judgment on this count because, to the extent it did not promptly make payment to the plaintiff, the amount of the plaintiff's claim under the insurance policy was legitimately in dispute. In response, the plaintiff contends that the defendant failed to pay in the requisite prompt manner certain aspects of its claim that were not disputed, and that what the defendant characterizes as disputed claims are actually a function of misrepresentations about the extent of coverage made by agents of the defendant to one of the plaintiff's partners.

Pursuant to section 2436, "[a] fire insurer has sixty days after receipt of an insured's proof of loss to either pay the claim, dispute the claim, or request reasonable additional information from the insured." *Marquis*, 628 A.2d at 651 (citation and internal quotation marks omitted). When the

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[2](...continued)
by the insurer of the additional required information; except that the time period applicable to a standard fire policy and to that portion of a policy providing a combination of coverages . . . insuring against the peril of fire shall be 60 days . . . .

2. An insurer may dispute a claim by furnishing to the insured, or his representative, a written statement that the claim is disputed with a statement of the grounds upon which it is disputed.

3. If an insurer fails to pay an undisputed claim or any undisputed part of the claim when due, the amount of the overdue claim or part of the claim shall bear interest at the rate of 1 1/2% per month after the due date.

4. A reasonable attorneys fee for advising and representing a claimant on an overdue claim or action for an overdue claim shall be paid by the insurer if overdue benefits are recovered in an action against the insurer or if overdue benefits are paid after receipt of notice of the attorney's representation.

5. Nothing in this section prohibits or limits any claim or action for a claim which the claimant has against the insurer.

24-A M.R.S.A. § 2436.

insurer requests "reasonable additional information," which can include a request that the insured produce documents, "a claim does not become overdue until sixty days following the insurer's receipt of the additional information." *Id.* Section 2436 is penal in nature, so its requirements must therefore be strictly construed; an insurer's technical compliance with the statute's terms are sufficient to evade any liability thereunder, even in the face of bad faith on the part of the insurer. *Id.*

I agree with the plaintiff that the summary judgment record generates a genuine issue of material fact concerning the defendant's compliance with section 2436 as regards that portion of the plaintiff's claim that sought reimbursement for debris removal. In its reply memorandum, the defendant takes the position that the plaintiff has not "substantiated making a claim which Defendant failed to meet with either a denial, a payment, or a request for reasonable information within the allotted sixty days." Defendant's Reply Memorandum at 1. To the contrary, the documents submitted by the plaintiff show that it made a claim for debris removal, and Watson's sworn assertion that this claim was neither paid nor disputed — buttressed by the absence of references to debris removal in the defendant's written reply to the March 1995 proof of loss — is all the substantiation the plaintiff need produce to generate a genuine issue of material fact.

It has long been established that section 2436 obligates an insurer to pay within the specified time period that portion of a claim it does not dispute, even as it invokes its right to contest its obligation to make further payment. *Maine Mut. Fire Ins. Co. v. Watson*, 532 A.2d 686, 690-91 (Me. 1987). Therefore, as to that aspect of Count II seeking the remedy available under section 2436 in connection with the debris removal claim, summary judgment is inappropriate.

However, I agree with the defendant that it is entitled to summary judgment as to the

remainder of the plaintiff's section 2436 claim. With the exception noted above, the plaintiff has not controverted the defendant's properly supported factual assertions to the effect that every time the plaintiff did anything that could be construed as making a claim for reimbursement under the policy, the defendant either paid it, disputed it or made a reasonable request for additional information, all within the 60 days set forth in the statute as applicable in cases of fire insurance claims.

The plaintiff takes the position that the request for additional information, as made by the defendant in response to the March 1995 proof of loss, was not reasonable in light of the fact that all of the plaintiff's financial records were destroyed in the fire. The implication is that the defendant was avoiding its obligation to make prompt payment of the claim by seeking information it already knew to be unavailable. The record does not support such an inference, however. The Kidder Letter explicitly requests only information that survived the fire — including documentation of business lost by the plaintiff subsequent to the blaze. There is no genuine issue of material fact concerning the question of whether the information requested on that occasion was "reasonable additional information" within the meaning of section 2436.

Finally, the plaintiff devotes considerable effort to pressing its contention that the defendant, through its agent Kidder, misrepresented the extent of the policy's coverage to the plaintiff during the adjustment process and otherwise failed to assist the plaintiff in understanding the policy's provisions. These assertions may have relevance to the other aspects of the case but have no significance for the section 2436 claim. As made clear in *Marquis*, section 2436 must be strictly construed and the only real question is technical compliance with its terms. The only trialworthy issue on Count II that emerges from the summary judgment record is whether the defendant

technically complied with its section 2436 obligations as to the claim for debris removal.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED IN PART AND DENIED IN PART** as follows: granted on Count II except as to that aspect of the claim that concerns prompt payment for debris removal expenses, and otherwise denied.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this ___ day of April, 1997.

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David M. Cohen
United States Magistrate Judge